

CHAPTER VII

EMPLOYMENT

Section 2. Selection Cases

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A. Legal Standards for Selection Cases

1. The Scope of This Section

This section discusses a major category of employment complaints under the FEHA - "standard" selection cases. These are cases in which the complainant claims that the respondent failed in some way to place the complainant in an employment position, and that the respondent did this because of the complainant's protected status (race, sex, national origin, etc.).

- The most typical selection case involves an outright refusal by an employer to hire the complainant for a particular job. But the same basic analysis applies to other kinds of "failure to place," such as denial of promotion, transfer, or entry into a training program, or denial of a particular job assignment. Also, standard selection cases include situations where the employer has not rejected the complainant outright, but has instead discouraged the complainant from applying, refused to accept the complainant's application, or eliminated the complainant from equal consideration with other applicants (see relevant question A in the "Explanation of Analytical Outline" below).
- In some cases involving layoffs, the choice of who to layoff and who to retain is analytically similar to the choice of who to select for certain positions. For such cases, you may use the analysis in this section. Other layoff cases are analytically similar to "standard" termination cases. For these cases, use the analysis in Termination (Section 1 of Chapter VII).
- Standard selection cases focus mainly on Issue II. The respondent defends by claiming that its failure to select the complainant was not discriminatory to begin with, rather than by asserting some affirmative defense. Some other kinds of selection cases focus mainly on Issue III (such as physical handicap cases or employers' efforts to justify blanket exclusions of women from certain jobs with the BFOQ affirmative defense). Because the affirmative defenses in these cases raise unique problems, these cases are dealt with in other sections (see Sections 9, 11, and 12 of Chapter VII).
- In standard termination cases, the key question under Issue II is whether there was a "causal link" between the failure to select and the complainant's protected status. Other kinds of prohibited action under Issue II (e.g., "adverse impact" or "failure to accommodate" religious beliefs) can also involve failure to select, but these cases are also discussed in separate sections (see Sections 8 and 15 of Chapter VII).

Because standard selection cases focus on Issue II, this section will discuss the applicable legal standards and analysis only for Issue II.

2. The Legal Standard

Standard selection cases use the same basic legal standard as most cases under Issue II. If the complainant falls within a group protected by the FEHA, discrimination is shown if:

- a. The respondent took some "adverse action" (in this case failure to select) against the complainant, and
- b. A "causal connection" exists between the complainant's protected status and the adverse action.

3. Discussion of the Legal Standard

The key to this standard, obviously, is the "causal connection." If the complainant's protected status was "a factor" in (was part of the respondent's conscious motivation for) the failure to select, the requisite causal connection exists and we say that the adverse action was taken "because of" the complainant's protected status. This is the sense in which the respondent's conduct must be "intentional."

The complainant's protected status need not be the sole reason for the respondent's actions. Even if other, non-discriminatory factors also entered into the respondent's decision not to select, the legal standard is still met as long as the complainant's protected status was at least one of the factors influencing the decision.

Remember, however, that the presence of these other, non-discriminatory reasons for the respondent's conduct might limit the remedy that can be obtained for the respondent's discriminatory conduct. If the complainant's protected status was a factor in the respondent's decision not to select her, the respondent loses Issue II, and, if no affirmative defense exists, a violation of the FEHA is established. The respondent still has the opportunity under Issue IV, however, to show that one or more of the other, non-discriminatory factors would still have led it to refuse to select the complainant, even if no discriminatory motive had been present. If this showing is made, the complainant may not be entitled to back pay and benefits or placement in the employment position originally denied. If a case involves multiple causal factors of this kind, be sure to analyze the problem under Issue IV (see Section 16 of Chapter VII).

B. Analysis of Selection Cases

Although the "causal connection" legal standard is quite simple, the evidence relevant to this standard is often more complex. Respondents rarely admit that they were motivated by the race, national origin, etc., of the complainant unless they feel that an affirmative defense will excuse it. In standard selection cases, however, respondents almost never rely on an affirmative defense, but claim instead that they did not discriminate to begin with. Thus, "direct" evidence of a causal connection (e.g., a supervisor stating that he did not hire the complainant because of her sex, race, etc.) is usually not found in standard selection cases.

Because of this, and because of the nature of these cases, the Commission will look to many other kinds of "indirect" evidence to determine whether the complainant's protected status was a motivating factor in her rejection. The variety of these kinds of evidence and the differences in the logical routes by which they bear on Issue II require that we use relevant questions to help organize and assess these segments of evidence.

The analytical outline below contains suggested relevant questions for the most typical kinds of evidence that appear in standard selection cases. Remember to use these questions only as the starting point for your own analysis. Each case is different and may well involve only some of the questions below, or may require modifications or different questions altogether.

1. Analytical Outline

II. Discrimination

Did the respondent fail to select the complainant because of the complainant's protected status (race, sex, etc.)?

Relevant Questions:

- A. Did the adverse action (failure to select) actually happen?
- B. Is the respondent's claim that the complainant is less qualified than the person selected accurate?
- C. Is any other rebuttal asserted by the respondent valid?
 - 1. Is the respondent's reason for not selecting the complainant factually accurate?
 - 2. How did the respondent treat others who were similarly situated to the complainant?
- D. Does the respondent's application of its pre-selection procedures to similarly situated persons indicate that the failure to select occurred because of the complainant's protected status?
- E. Does the relevant statistical pattern indicate that the failure to select occurred because of the complainant's protected status?
- F. Is there any direct evidence to link the failure to select to the complainant's protected status?
- G. Is there any anecdotal evidence to link the failure to select to the complainant's protected status?
- H. Other relevant questions?

2. Explanation of Analytical Outline

II. Discrimination

Did the respondent fail to select the complainant because of the complainant's protected status (race, sex, etc.)?

The legal standard for Issue II in selection cases asks whether there is a causal link or connection between the complainant's protected status and the adverse action. The Issue question above, then, states Issue II in terms of the legal standard by asking whether the adverse action occurred because of the complainant's protected status. The respondent almost always denies the existence of this causal connection, and most of the relevant questions for this Issue question therefore focus on this disputed aspect of the case.

NOTE: If the complainant's protected status was a factor in the respondent's action (that is, even if it was only one of several factors influencing the respondent) this will be sufficient to establish the requisite causal connection.

Relevant Questions:

A. Did the adverse action (failure to select) actually happen?

While the key to Issue II in standard selection cases is the causal connection between the complainant's protected status and the failure to select the complainant, there must of course have been a failure to select to begin with. Because respondents sometimes claim that there has been no failure to select, this outline starts with a relevant question addressed to this part of the legal standard. If the evidence shows that there has not been a failure to select, there is obviously no need to go on to the remaining relevant questions.¹

In situations where there is 1) a vacant job or other employment position, 2) the complainant applies formally or otherwise indicates interest, and 3) the respondent rejects the complainant for the position, there is no question that a failure to select has occurred. Where one or more of these elements is not clearly present, however, there may be some question whether an adverse action has been taken:

1. Job Vacancy

Respondents sometimes assert the rebuttal that there was no available job or other employment position to begin with, and thus nothing for the complainant to be rejected from. Be sure

¹In a few cases the respondent may claim that the characteristic, or "status," of the complainant that is claimed to have caused the rejection does not qualify as "protected status" under the FEHA. For example, a respondent may claim that a complainant's moral beliefs do not qualify as "religion," or that a complainant's physical condition does not qualify as a "physical handicap." Because these are essentially claims that the complaint is not covered by the FEHA, they should be analyzed as jurisdictional disputes under Issue I. See, for example, Sections 8 and 9 of Chapter VII.

to check the accuracy of this claim. Watch for two common situations:

- a. The respondent may originally have a specific job opening, and the complainant may apply for it and be clearly rejected. The respondent may then claim, however, that the sole reason for the rejection was that the job opening disappeared (due to budget cuts, staff reorganization, etc.) before anyone could be hired. Test the validity of this claim. Check, for example, whether all other applicants were similarly rejected, whether there really was a budget cut, whether the respondent waited five months and then hired one of the original applicants, and so on.
- b. Large respondents often have a formal or informal policy of accepting applications continually for basic job categories (e.g., maintenance, clerical, food services, laborer) in which positions open up frequently. These respondents' personnel departments often accept general applications even when no current job openings exist. If a complainant who seeks to apply is told nothing is available and is not allowed to apply, the respondent may claim that there was no adverse action because there was no job vacancy. In such situations, however, a specific, current job opening need not have existed. If the evidence demonstrates that job openings later occurred, the complainant was clearly denied access to these and an adverse action has therefore been taken. (Even if no later openings occurred, however, discrimination may still have occurred. The complainant may have suffered denial of the right to apply, even if he suffered no failure to select him for an actual job.)

2. Application

In some situations where a specific job opening does exist, the respondent may claim that the complainant never applied, and therefore that the respondent could not have acted adversely toward him or her because it did not know the complainant was interested in the job. Check whether the complainant actually applied (keeping in mind that a formal application is often not required). Even if the complainant did not apply, however, you should also check whether the respondent was itself responsible for the complainant's failure to apply. Again, two common situations:

- a. You may find that the respondent directly or indirectly prevented the complainant from applying. The respondent may actually have told the complainant there was no job available, or simply refused to let him or her apply. Or the respondent may have given the complainant some kind of run-around, after which the complainant gave up the effort to apply. In such cases, the respondent may still be liable for a failure to select, even though the complainant never went through the selection process. It may be difficult to demonstrate that the complainant would have been given the job had he or she not been excluded

from the selection process, but in certain situations (e.g., where only two other applicants were considered and the complainant was much better qualified than both) such a showing can be made. (And the respondent will be liable in any event for a denial of the right to apply, for which the remedy is being permitted to apply and, perhaps, compensatory damages.)

- b. You may also find that the respondent's conduct had the effect of discouraging or "chilling" the complainant from applying. If a respondent has never hired a woman for a particular job, for example, or has put the word out that it will not do so, a complainant may well have been deterred from applying as effectively as if the respondent had actively prevented her from doing so. Here again, the respondent may be liable for a failure to select, or at least for denial of the right to apply.

3. Rejection

In other situations, the respondent may claim that it never actually rejected the complainant. In some cases, this merely means that the respondent never formally notified the complainant but has in fact rejected him or her for the job. In some cases, however, the respondent may claim that the complainant is still "under consideration" for the vacancy or for future similar vacancies. In such situations, you should check whether the original vacancy has been filled. Even if it has not been filled, check if there is any evidence that the reason it has not yet been filled is to avoid giving it to the complainant. Such conduct would constitute a denial of the job as much as an outright rejection.

B. Is the respondent's claim that the complainant is less qualified than the person selected accurate?

If it is clear that the respondent has taken an adverse action against the complainant by failure to select him or her, we can move on to evidence showing that there was (or was not) a causal connection between the complainant's protected status and the failure to select. All the remaining relevant questions in this outline address this part of the legal standard.

In nearly every standard selection case, the respondent will reply to the complainant's claim that he or she was not selected "because of" his or her protected status with one or more "rebuttals." Each rebuttal is a claim that some legitimate factor other than the complainant's protected status (a "non-discriminatory" factor) was so clearly the real motivation for the failure to select as to negate any inference that the protected status played any role at all in the decision not to select the complainant.

The respondent's rebuttals are usually the core of its argument on Issue II. If the evidence strongly supports one or more of the rebuttals, the Commission is likely to infer that these factors, and not the complainant's protected status, were the true causes of the termination. But if the evidence does not clearly support

the rebuttals offered by the respondent, the Commission will not search on its own for still other non-discriminatory explanations; it will infer instead that the complainant's protected status was at least one of the factors motivating the failure to select.

Thus, the viability of the rebuttals offered by the respondent is very important to the analysis of Issue II. The next several relevant questions in this outline are designed to test the viability of these rebuttals.

Relevant question B asks about the most common kind of rebuttal in standard selection cases - the respondent's claim that it rejected the complainant because he or she was less qualified for the job than the person who was selected. The evidence under this relevant question should be analyzed in two steps:

1. Did the respondent actually apply the criteria it claims to have applied to the complainant and the person selected?

Any respondent claim that the complainant was less qualified than the person selected is really a claim that 1) the respondent applied certain criteria in the selection process, and 2) under these criteria, the complainant was less qualified. The first step, then, is to check whether the respondent really applied the criteria it claims. If it did not, the viability of its claim that the complainant was rejected because of lesser qualifications is immediately undermined.

Begin by obtaining any written criteria the respondent claims to have used. Then find out what criteria the persons who actually made the selection decision say they used, and check any documentary record of the selection process. The person selected and other applicants might also be able to indicate what criteria were actually used.

If the real criteria remain in doubt, you can also check the results of this selection process (and similar previous processes) to see if the claimed criteria were applied. If applicants other than the complainant and the person selected were involved in this process, compare their qualifications (under the claimed criteria) with those of the person selected. The more of these other applicants there are who appear better qualified than the person selected (whether or not they share the complainant's protected status), the less likely it will appear that the respondent actually applied the selection criteria it claims. If this aspect of your case is important enough, you can also examine the qualifications of the persons selected for the same position in the past. If they also do not fit the claimed criteria, the respondent's claim will be further undermined.

Remember that, if you find that the respondent did not apply one or more of the criteria it claims, you should still find out which criteria it really did apply. This will permit you to go on to the second step, below.

2. Under the criteria actually applied, was the person selected better qualified than the complainant?

The next step is to compare the qualifications of the complainant and the person selected, under the criteria that were actually applied. Where the respondent did in fact apply the criteria it claims to have applied, but the complainant was better qualified under those criteria, the respondent's rebuttal is seriously undermined, and the Commission is very likely to infer a discriminatory motive. (Even where the actual criteria were different from those the respondent claimed, however, it is still useful to compare qualifications. The Commission will still expect the respondent to have picked the most qualified person, whatever criteria it really used. If it did not, the inference of discriminatory motive will still be drawn.)

If the criteria the respondent applied are reasonably objective (e.g., years of relevant prior experience, years of education, possession of certain degrees, etc.), you may be able to compare qualifications simply by examining resumes, application forms and similar documents. The more subjective the criteria are, however (e.g., quality of performance at previous jobs, attitude, capacity to lead, etc.), the more you will need to evaluate qualifications by interviewing co-workers, former supervisors, the candidates themselves, and so on.

C. Is any other rebuttal asserted by the respondent valid?

In some standard selection cases, the respondent will assert, along with (or in place of) a claim that the complainant was less qualified than the person selected, other kinds of rebuttals that do not involve comparative qualifications.

Example:

Complainant, who was born in Mexico, applied for a security guard position with Respondent and was rejected. Respondent claims that Complainant was rejected because he lied about a previous drunk driving conviction on his application and because he was not referred through the union referral system, in violation of the collective bargaining agreement. Respondent has in the past hired security guards who had prior convictions for traffic and other offenses.

Neither of these rebuttals rests on a claim that Complainant was less qualified for the job than the person hired. Respondent is not claiming that Complainant's drunk driving conviction rendered him less qualified than the person hired. It claims instead that his lying about the conviction eliminated him from consideration.

Some rebuttals under this relevant question do involve "qualifications," however. Respondents sometimes claim that a complainant was not hired because she failed to meet certain threshold or "minimum" qualification standards. While such

rebuttals involve qualifications, they do not rest on comparisons to the person actually hired.

Example:

Complainant, a woman, applies for a welder position on a nuclear power plant construction project. Respondent claims that it rejected her because she did not hold a special safety certificate required by State law for welders working on reactor containment vessels. This rebuttal is a claim that Complainant did not meet a threshold qualification, but it is not a claim that Complainant was a less able or experienced welder than the person actually hired and therefore less qualified.

This relevant question has two subparts:²

1. Is the respondent's reason for not selecting the complainant factually accurate?

First determine whether the reason the respondent claims for not selecting the complainant is really true. Is it true that the complainant lied about a previous conviction and that he was not referred by the union? Is it true that complainant does not have her safety certificate from the State? If the respondent's claimed reasons did not in fact exist, the Commission will be inclined to infer from the beginning that these reasons did not in fact motivate the respondent to reject the complainant.

Remember to check the factual accuracy of each element of the respondent's rebuttal. The respondent's claim that the complainant lacked the necessary safety certificate, for example, is really a claim that 1) the certificate is required by the State, 2) the respondent honored this requirement in actual practice, and 3) the complainant did not have a certificate. If any one of these elements is not factually correct, the viability of the entire rebuttal is undermined.

Beware of a trap under this subpart. In some cases, the respondent will believe in good faith that certain circumstances exist, even when they really do not, and will reject the complainant based on that belief. In such cases, the factual inaccuracy of the rebuttal does not undermine its validity, since the respondent's good faith belief is itself a plausible non-discriminatory reason for its action. If the evidence shows, for example, that the respondent rejected the complainant because it had reason to believe she lacked a safety certificate, the fact that she really had a certificate does not undermine the rebuttal; there really was a non-discriminatory reason for the rejection, even though it was mistaken. Whenever you find that a rebuttal is factually

²The two subparts that follow employ the same basic analysis of respondent rebuttals that is used in relevant questions B and C in Section 1 of Chapter VII, on termination cases. Refer to the discussion of those questions for a more thorough discussion of the basic concepts involved in this analysis.

inaccurate, then, always check to see whether the respondent can claim that it nevertheless believed in good faith that the rebuttal was accurate.

2. How did the respondent treat others who were similarly situated to the complainant?

Even if the reason the respondent claims for rejecting the complainant is factually accurate (or if the respondent believes in good faith that it is), we can further test the rebuttal by asking whether others to whom the same reason applied were also rejected. If they were, the Commission will be likely to infer that the claimed reason really did motivate the complainant's rejection. If these others were not rejected, however, the Commission will doubt the claimed reason and will look instead to differences in the protected status of the complainant and the others to explain the difference in treatment. This evidence should be analyzed as follows:

a. Determine who is similarly situated to the complainant.

Other persons are similarly situated to the complainant if they are sufficiently like the complainant to warrant the assumption that the respondent would treat them equally. The more similar these others are to the complainant, the stronger is our expectation that they will be treated alike, and the stronger is our inference of discrimination when they are not. There are at least two key similarities to look for:

1) The persons being compared to the complainant should be under the same decision-maker who rejected the complainant.

If the persons we are comparing to the complainant were considered for selection by someone other than the decision-maker who rejected the complainant, it will be difficult to infer anything about the motives of the complainant's decision-maker from the treatment of those other persons. In this situation, we cannot rely on the critical assumption that one decision-maker will treat all persons equally since no single decision-maker had authority to select or reject all the persons involved. Thus, only those persons subject to the authority of the person who rejected the complainant are similarly situated to her.

Example:

Respondent claims it rejected Complainant for a welding job on reactor containment vessels because she lacked the necessary safety certificate. Respondent has conducted three previous hiring processes for welders in the past two years, in addition to the one in which Complainant was rejected. The first two processes were conducted

by a site foreman who has since left Respondent's employ. The third process was run by the same foreman who ran Complainant's process.

The persons considered in the first two hiring processes are not similarly situated to Complainant. Even if all of them were men, all lacked certificates, and all were still hired, we could not infer anything about the bias (or lack of it) of Complainant's foreman, since he had nothing to do with these hiring processes.

The persons considered in the third hiring process and in Complainant's own process are similarly situated to her in this respect, since the same foreman controlled both processes. (We would want to be sure, however, that there was not some decision-maker above both of these foremen, who had the final say on all their hiring decisions. If there was, the persons in all four hiring processes would be similarly situated.)

- 2) The respondent's rebuttal should also apply to the persons being compared to the complainant.

The circumstances that the respondent claims led it to reject the complainant must also apply to those being compared to the complainant. Once you have found the group of persons who were subject to the same decision-maker as the complainant, pick out those who share the characteristic that allegedly produced the complainant's rejection.

Example:

In the welder example above, Respondent hired special welders for reactor containment vessels and others for general-purpose welding at the same time in each hiring process. General-purpose welders do not need safety certificates.

To isolate the similarly situated group, you would pick out, from the third and fourth hiring processes, only those persons who 1) applied like Complainant for the special welding jobs (and therefore needed certificates) and 2) did not (like Complainant) actually have certificates.

- b. Determine who was rejected and who was not.

After you have isolated the similarly situated group, all that remains is to determine whether they were or were not rejected, as the complainant was, and whether they share the complainant's protected status. The more uniformly those who do not share the complainant's protected status were selected and those who do share her status were rejected, the stronger is the resulting inference of

discriminatory motive in the decision-maker (and vice versa).

Example:

In the welder example above, the similarly situated group consists of ten men and one woman. Nine of the men were hired as special welders and one was rejected. The woman was rejected. This evidence shows a strong tendency in the foreman who rejected Complainant to hire men and reject women, even where both sexes lacked the necessary certificate. From this difference in treatment, the Commission would refer that lack of a certificate was not the reason for Complainant's rejection, and that her sex was.

If Respondent had rejected all those similarly situated, on the other hand, the evidence would support the rebuttal. If Respondent had hired the other woman or hired only half of the men, no clear inference could be drawn either way (except perhaps that Respondent did not apply the certificate requirement to begin with).

- D. Does the respondent's application of its pre-selection procedures to similarly situated persons indicate that the failure to select occurred because of the complainant's protected status?

The same basic analysis that was used in the second subpart of relevant question C above can also be applied to aspects of the respondent's treatment of the complainant other than the actual decision to reject her. Many selection processes include several steps before the actual select/reject decision is actually made (e.g., preliminary screening, written exam, first interview, second interview, etc.). Differences in the way this "pre-selection" procedure was applied to the complainant and to others similarly situated may help indicate whether the complainant's rejection was itself biased.

Example:

Complainant, who is Black, applied for promotion from Firefighter to Lieutenant. Respondent's promotion procedures call for a written test and then a series of three interviews before each candidate is ranked on a list of eligibles. Complainant passed the test and was required to go through all three interviews. White applicants who passed the test had to go through only two interviews and were excused entirely from the third interview.

No matter whether the White applicants were ultimately selected or not, this difference in the application of the pre-selection procedures suggests that Complainant's ultimate rejection was racially motivated.

Less favorable treatment of the complainant before the selection decision, of course, is itself an "adverse action" separate from the ultimate rejection. In most cases, however, the remedy for

this separate harm is too insignificant to warrant a separate Issue question. Instead, we use the evidence of this pre-selection discrimination to test whether the failure to select was itself discriminatory.

To analyze this evidence, use the same approach outlined under the second subpart of relevant question C:

1. Determine who is similarly situated to the complainant.

- a. Find out which decision-makers were responsible for administering the steps in the selection procedure leading up to the selection decision itself, and identify the group of candidates subject to this same decision-maker. (Make sure that the persons who administer the pre-selection steps in this procedure are the same persons who made the ultimate decision to reject the complainant.)
- b. From that group pick out those candidates who would ordinarily be expected to go through the same pre-selection procedures as the complainant.

(Usually the similarly situated group will simply be all those going through the same selection process as the complainant. In some cases, however, you may find that some candidates are subject to different decision-makers or different procedural requirements. You may also wish to compare complainant's treatment in the current selection process to the treatment of others in prior, similar selection processes.)

- c. Decide whether there are any other characteristics a person must have to be similarly situated in your particular case and pick out, from the group isolated by steps a. and b., the persons who have these characteristics. (Remember to anticipate all the non-discriminatory reasons that might make the persons you are comparing not similarly situated.)

2. Determine how the similarly situated persons were treated relative to the complainant.

- a. Find out whether or not the respondent applied its pre-selection procedures more favorably to each similarly situated person than to the complainant. Also find out whether or not each similarly situated person shares the complainant's protected status.
- b. Decide what inference to draw from this evidence. The less favorably those who share the complainant's protected status were treated, relative to those who do not, the stronger is the inference of discriminatory motive in the decision-maker who rejected the complainant (and vice versa).

E. Does the relevant statistical pattern indicate that the failure to select occurred because of the complainant's protected status?

In many standard selection cases, two basic kinds of statistics may also help demonstrate a causal connection between the complainant's protected status and the failure to select: "workforce" statistics and selection rate statistics.

"Workforce" Statistics

In general, the absence of persons sharing the complainant's protected status in certain positions or in the entire workforce may suggest that the respondent is generally biased against selecting such persons. The Commission will in turn infer that this general bias infected the respondent's decision not to select the complainant. While the Commission sometimes acts enthusiastic about statistical evidence, its precedential decisions make clear that the inference it is prepared to draw from such evidence is never sufficient alone to demonstrate the causal connection. Instead, the Commission will generally treat statistical patterns as only supporting other evidence that already suggests bias.

The most basic kind of "workforce" statistical pattern is one showing that only a small number of persons sharing the complainant's protected status (or perhaps none) are employed by the respondent in its entire workforce. The Commission is likely (but not certain) to draw an inference of bias from this simple statistic, but there are several ways in which the force of this evidence can be improved:

1. Focus on particular jobs or job categories.

The Commission is inclined to focus on the composition of the particular job being sought by the complainant, or on a group of similar jobs. If there are few or no persons sharing the complainant's protected status in these positions, the Commission is more likely to find bias in the decision to reject the complainant. In cases involving denial of promotion to management positions, the Commission is particularly likely to look at the composition of all management positions at roughly the level of the position the complainant was denied. (See DFEH v. Lucky Stores (1980) FEHC Dec. No. 80-30, page 11; DFEH v. Housing Authorities of the City and County of Fresno (1980) FEHC Dec. No. 80-20, page 11.)

The Commission adds another dimension to this kind of evidence in cases involving denial of transfer or promotion. In addition to examining the composition of the position the complainant sought to gain, the Commission will sometimes also examine the composition of the position or type of position the complainant sought to leave. Thus, if a Black or female complainant in a clerical or office worker position was denied a management or supervisory position, the Commission will be more inclined to infer bias in the denial if the management or supervisory ranks have few Blacks or women and if the clerical or office worker ranks are largely Black or female. (See DFEH v. Transcon Freight Co. (Pipkin) (1981) FEHC Dec. No. 81-02,

2. Compare the respondent's workforce to the labor market or applicant flow.

In the cases cited above (in all of which discrimination was found to exist), the Commission was willing to assume that the low numbers of Blacks or women in the job categories sought by the complainants meant that the respondents had in the past been biased against selecting Blacks and women in those categories, without inquiring whether the numbers were low because there were few Blacks or women in the surrounding labor market or because few Blacks or women applied.

In other cases, however (in which the Commission did not find discrimination), the Commission has refused to infer discrimination from simple statistics showing underrepresentation unless there was also evidence that 1) the number of Blacks or women available for the job in the surrounding labor market or 2) the number of Blacks or women who actually applied for the job was disproportionately higher than the number who eventually entered the employer's workforce. (See DFEH v. Transcon Lines (Jones) (1981) FEHC Dec. No. 81-05, page 7; DFEH v. Trans World Airlines (1981) FEHC Dec. No. 81-04, pages 9 and 10.)

These cases indicate that it is always desirable to obtain evidence at least about the composition of the surrounding labor market, and that it is best to obtain information about the composition of the group who applied for the job categories involved, if such evidence is available. This evidence should be analyzed in the following way:

a. Labor Market Comparisons

The proportion of the employees in the job categories being examined who share the complainant's protected status should be compared with the proportion of persons sharing that status in the surrounding labor market. A much lower proportion in the job categories than in the labor market suggests the respondent's bias.

Example:

Complainant, a Black, applied for a salesperson position in a retail department store, and was rejected. Of 100 salespersons in Respondent's employ, only four are Black, a proportion of four percent. Standard statistics for the labor force in the surrounding area indicate that the available labor force is 16.5 percent Black. The low proportion of Blacks in the salesperson job category, relative to the proportion of Blacks in the labor force, suggests Respondent's general bias against hiring Blacks in that position.

b. Applicant Flow Statistics

Statistics on the number of applicants for the job being examined permit us, in effect, to compare the number of persons sharing the complainant's protected status in the respondent's work force with the number who actually applied, instead of the number who are merely available in the labor force generally. This "applicant flow" comparison is more powerful because it meets the respondent's potential claim that it had so few persons of the complainant's protected status in its work force not because it discriminates, but because few such people ever apply.

The best way to handle "applicant flow" data is to compare the selection rates for persons sharing the complainant's protected status and for all other persons. A sharp difference in the rates suggests the respondent's bias.

Example:

In the salesperson example above, data for the last three hiring processes for salesperson shows that ten Blacks applied and one was hired, and 45 non-Blacks applied and 15 were hired. The selection rates for the two groups are:

$$\begin{array}{l} \text{Blacks: } \frac{1 \text{ hire}}{10 \text{ applicants}} \times 100 = 10 \text{ percent} \\ \\ \text{Non-Blacks: } \frac{15 \text{ hires}}{45 \text{ applicants}} \times 100 = 33 \text{ percent} \end{array}$$

The much higher non-Black selection rate suggests Respondent's general bias against hiring Blacks in the position. This in turn suggests that the real reason that only four percent of the Respondent's salespersons are Black is not that relatively few Blacks apply, but that the Blacks who do apply are far less likely than non-Blacks to be hired.

In cases where the sample group is sufficiently large, you should calculate similar selection rates for other groups, such as Whites, Hispanics, etc. Then, compare the selection rate of the complainant's group to that of the most advantaged subgroup, usually Whites.

A second aspect of "applicant flow" data is also useful in testing a respondent's claim that it employs few persons of complainant's protected status because few apply. The proportion of all applicants (over a given period) who share the complainant's status can be compared to the proportion of the group actually selected who share that status. If the proportion of the persons sharing the complainant's status is much lower in the group selected

than the group who applied, the inference is that it is the respondent's bias, not low applicant flow, that caused the under-representation in the respondent's work force.

Example:

In the salesperson example above, the proportion of Blacks in the applicant group is:

$$\text{Applicants: } \frac{10 \text{ Blacks}}{55 \text{ applicants}} \times 100 = 18 \text{ percent.}$$

The proportion of Blacks in the group actually hired, however, is:

$$\text{Hires: } \frac{1 \text{ Black}}{16 \text{ hires}} \times 100 = 6 \text{ percent.}$$

These figures show that Blacks applied for salesperson jobs in much the same proportion that they are present in the available labor force generally (16.5 percent), but that a much smaller proportion of Blacks actually made it into the salesperson category. Again, the inference is that Respondent's bias against hiring Blacks, not a small number of Black applicants, has caused the low representation of Blacks in the salesperson job generally.

3. Use large numbers, if possible.

In general, the larger the numbers involved in a statistical pattern, the more reliable is the inference drawn from them. The Commission has not applied standard statistical tests to its patterns to determine formally if they are reliable, probably because the Commission does not give primary weight to such evidence to begin with. Thus, even relatively small numbers can be used (e.g., no Blacks in a job category with 15 incumbents), but they will still be weaker than larger numbers.

4. Try to tie the statistical pattern to the decision-maker(s) who rejected the complainant.

As we saw in the "similarly situated" discussion under relevant question C, the respondent's motivation that is the focus of Issue II is really the motivation of one or more of the respondent's supervisors or managers. Thus, if we are trying to infer that the general bias revealed by a statistical pattern also affected the complainant's rejection in particular, that inference will be much stronger if the person who actually rejected the complainant is the same person whose other selection decisions produced the whole statistical pattern. The Commission has not insisted on this, however, in using statistical evidence in its selection decisions.

Selection Rate Statistics

Even in cases where persons of the complainant's protected status are not under-represented in the respondent's whole work force or a relevant part of it, comparison of the selection rates for persons sharing the complainant's status and for all other persons may still help demonstrate a causal connection between the complainant's status and the failure to select. The Commission is likely to draw this inference if the selection rate for persons sharing the complainant's protected status is markedly lower than the rate for all other persons. These selection rates can be computed as shown in the first example under "Applicant Flow Statistics" above (under relevant question G).

F. Is there any direct evidence to link the failure to select to the complainant's protected status?

In a few cases, a piece of evidence demonstrates a fact that is itself the answer to the Issue question (e.g., a supervisor's statement that "we didn't hire complainant because we didn't want a Black in the job" demonstrates the causal connection directly).

Always check for this very powerful evidence, but do not expect to find it very often.

G. Is there any anecdotal evidence to link the failure to select to the complainant's protected status?

Anecdotal evidence about particular events or conduct (e.g., racist remarks, harassment of the complainant and others of the same protected group, etc.) may demonstrate that the respondent supervisors or managers who terminated the complainant were generally biased against the group sharing the complainant's protected status. As with statistical patterns, the Commission will in turn infer that this general bias was at work in the decision not to select the complainant.

Analyze this evidence in two steps. First, make sure that the supervisor or manager to whom the evidence applies played some role in the decision not to select the complainant. (If he played no such role it is obviously difficult to link his general bias to the complainant's rejection.) Second, evaluate the evidence to determine whether the claimed events (the remarks, harassment, etc.) really occurred and whether they do in fact show general bias against the complainant's protected group.

H. Other relevant questions?

Always ask whether kinds of evidence other than those discussed above would be relevant to the Issue question. Two examples:

1. Subjective Standards

If the "non-discriminatory factors" on which the respondent claims to have based its decision not to select the complainant are vague and subjective (e.g., "lack of initiative," "unaggressive," "not management material"), the Commission has indicated that it will be more likely to find

that the failure to select was biased. This is because such factors do not adequately protect against the potentially discriminatory motives of the supervisors making the selection decisions, particularly where the supervisors do not share the complainant's protected status.

2. Pattern of Subsequent Hirings

Ordinarily the fact that a respondent has selected someone who does not share the complainant's protected status (e.g., the respondent hires a man instead of the female complainant) does little in itself to demonstrate discriminatory motive. In certain circumstances, however, repeated selection of persons who do not share the complainant's protected status might suggest bias.

Example:

Respondent city uses a standard civil service hiring procedure for the Juvenile Hall Guard position, under which it first creates a list of eligible candidates and then certifies the top three remaining candidates from the list for each actual job opening. The final hiring decision is left to the supervisor who has the job opening. Complainant, a woman, is ranked third on the list. She is certified for five successive job openings and is rejected each time in favor of a male candidate. This pattern in itself suggests that Complainant's sex played a role in her rejection for the first (and all subsequent) openings.

When you do decide that an additional segment of evidence is relevant to the Issue question, remember to write an appropriate relevant question that reflects that particular evidence. Do not simply repeat the language of relevant question H above, since that is only a reminder for you to go beyond this list of "typical" relevant questions. Also, if the additional segment of relevant evidence you consider here has already been analyzed as a separate adverse action under a separate sub-Issue question, you can incorporate this evidence under the sub-Issue question dealing with the failure to select by simply writing a relevant question and referring to the discussion of the evidence under the other sub-Issue question (see Chapter III, subsection B.4.a.).

C. The Law: Sources of the Legal Standards for Selection Cases

1. Statute and Regulations

FEHA (Government Code) Section 12940(a)(c)(d)(j)

Commission Regulations Sections 7287.2, 7287.3, 7287.4, 7290.9, 7291.0

2. Precedential Decisions

a. "Causal Connection" Cases

DFEP v. Ametek, Pacific Extrusion Division (Guerra) FEHC Dec. No. 80-11. Physical handicap (congenital anomaly of spine) - termination (racker-laborer). Complainant terminated for falsifying application inquiries regarding physical handicap; danger to self and others.

DFEH v. Ambylou Enterprises, Inc. (Wilson) FEHC Dec. No. 82-06. Sex (female) - conditional sexual harassment and termination (assistant controller). Agent/employer harassment demonstrated by similar pattern and hearsay witnesses; termination immediately followed rejection of advances and complaint to supervisor.

DFEH v. American Medical International, Inc. dba AMI: Medical Center of Garden Grove and Circle City Hospital (Willis) FEHC Dec. No. 86-13 (91-12; Order Modifying Decision Upon Remand 6/18/91). Race (Black) - denial of opportunity to apply for promotion (materials manager). More qualified Caucasian applicant promoted, but totality of circumstances showed racial inference.

DFEH v. Church's Fried Chicken (Jackson) FEHC Dec. No. 90-11. Race (Black) - termination (senior manager). Direct evidence of decision-maker's hostility toward Blacks; different treatment of Black employees. Reiteration of proof standards and Commission's analytical framework.

b. Selection Cases:

DFEH v. Housing Authorities of the City and County of Fresno (Mitchell) FEHC Dec. No. 80-20. Race (Black) - failure to hire as a housing inspector and failure to preserve records. Though successful non-Black applicant more qualified, a violation occurs if race plays a part in rejection.

DFEH v. Sonoma County Office of Education (Hansen) FEHC Dec. No. 80-25. Sex (female) and retaliation for filing DFEH complaint - failure to promote to Processing and Distribution Supervisor. Promotion violation demonstrated by showing: 1) Complainant more qualified than successful male applicant; 2) pre-selection requirement that complainant submit to additional interview not required of male applicant.

DFEH v. Lucky Stores (Turner) FEHC Dec. No. 80-30. Sex (female) - failure to promote to sales manager and termination (audio sales manager). Promotion denial substantiated by showing: 1) Complainant more qualified than successful male applicant; 2)

sex-biased comments by decision-maker; 3) absence of female audio managers.

DFEH v. Transcon Freight Co., Inc. (Pipkin) FEHC Dec. No. 81-02. Race (Black) - failure to allow "bumping" into subledger/bookkeeper job. Racial inference demonstrated by showing: 1) successful Caucasian applicant did not possess minimum qualifications; 2) reputation and opinion testimony about decision-maker; and 3) under-representation of Blacks in Respondent's management population.

DFEH v. Trans World Airlines (Pemberton) FEHC Dec. No. 81-04. Sex (female) - failure to select as a ramp serviceman. FEHC rejected Department's assertion that Respondent's burden was to demonstrate why it rejected Complainant; statistical evidence of under-representation of women insufficient to establish violation.

DFEH v. Transcon Lines (Jones) FEHC Dec. No. 81-05. Race (Black) - failure to hire as billing clerk. Respondent "reasonably believed" Caucasian successful applicant more qualified.

DFEH v. Alameda County, Sheriff's Department (Caulfield) FEHC Dec. No. 81-13. Race (Black) and sex (female) - failure to hire as cook. Race violation demonstrated by: 1) application of pre-selection procedures; 2) racial comments by decision-maker. Male BFOQ defense and standard for evaluating personal privacy concerns.

DFEH v. American Airlines (Sarembe) FEHC Dec. No. 83-15. Sex (female) - failure to hire as fleet service clerk. Inference of discrimination established by: 1) hiring less qualified males when Complainant told there were no available positions; 2) statistical under-representation of women.

DFEH v. Nursefinders of Oakland, Inc. (Nurse) FEHC Dec. No. 83-14. Race (Black) - failure to hire as director of nurses. Racial inference established by: 1) showing Complainant more qualified than Caucasian successful applicant; 2) lack of credibility in Respondent's professed reasons for rejection.

3. Court Decisions on Commission Cases

County of Alameda v. Fair Employment and Housing Commission (1984) 153 Cal.App.3d 499. Decision affirmed.

Church's Fried Chicken v. Fair Employment and Housing Commission; unpublished decision of California Court of Appeals (1990). Eliminated compensatory damage award.

American Medical International, Inc., dba AMI; Medical Center of Garden Grove and Circle City Hospital v. Fair Employment and Housing Commission. On 2/27/91 Court of Appeal, 4th District, set aside the compensatory and punitive award contained in FEHC Dec. No. 86-13. FEHC issued Order Modifying Decision Upon Remand (6/18/91).